Filed 7/22/19 P. v. Roberts CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DESHAWN MARQUES ROBERTS, Defendant and Appellant.	F077442 (Super. Ct. No. BF154248A) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Levy, Acting P.J., Detjen, J. and Meehan, J.

Upon remand from this court, the trial court declined to exercise its discretion to strike a firearm enhancement imposed pursuant to Penal Code section 12022.53, subdivisions (d) and (e)(1).[1] Deshawn Marques Roberts (defendant) appeals, claiming the trial court abused its discretion. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

DEFENDANT'S OFFENSES, CONVICTIONS, AND SENTENCE[2]

On the evening of April 2, 2014, a member of the Country Boy Crip criminal street gang was wounded in a drive-by shooting that took place in front of a market that was a well—known hangout of the gang. A witness described the vehicle from which the shots were fired as a gray or silver Chevrolet Impala. Store video showed a silver vehicle drive by and turn the corner. Two minutes later, the car drove past again, the shooting occurred, and the car sped off. Three spent Winchester brand .40-caliber Smith and Wesson shell casings were found in the roadway adjacent to the victim's location when he was shot.

The next day, police located the vehicle, which was being driven by defendant and which had been rented by his girlfriend. Two spent Winchester brand .40-caliber Smith and Wesson shell casings were found in the car. They and the three spent casings found at the scene of the shooting were determined to have been fired from the same gun.

Under questioning by detectives, defendant first denied being involved in the shooting and said his vehicle was not there. He subsequently said his cousin, Marlon Burch, asked to use the car. Defendant was reluctant to give permission, but Burch grabbed the keys and left. Someone defendant knew as "Maniac" got in the car with Burch. When Burch returned, he told defendant what had happened. Burch said he was

---

1 All statutory references are to the Penal Code.

2 The facts are taken from this court's opinion in *People v. Roberts* (Jan. 4, 2018, F071777) [nonpub. opn.], which is contained in the clerk's transcript of the present appeal.

the shooter, and that he went to a store in "the country" and was aiming for "anybody that was out there." Eventually, defendant admitted he was the driver. He took Burch to where Burch got the gun, then Burch told him to go to the market. Once there, Burch fired several times. Defendant and Burch discussed what was going to happen before they went. Defendant "just gave in" when Burch wanted to go do the shooting.

At trial, defendant testified that Burch had taken defendant's car keys without defendant's permission, and that defendant did not know about the shooting until after it happened. In the portion of his interview with detectives that was video recorded, he admitted being the driver because he thought this was part of a plan hashed out off camera whereby defendant would involve himself as an eyewitness so police could arrest Burch, and defendant would be cited and released for being an unlicensed driver, a misdemeanor.

Defendant was convicted of premeditated attempted murder in which a principal intentionally and personally discharged a firearm, proximately causing great bodily injury (§§ 187, subd. (a), 189, 664, 12022.53, subds. (d) & (e)(1); count 1), permitting another person to discharge a firearm from a vehicle (§ 26100, subd. (b); count 2), being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 3), carrying a concealable firearm in a vehicle while an active participant in a criminal street gang (§ 25400, subd. (c)(3); count 4), and being an active participant in a criminal street gang (§ 186.22, subd. (a); count 5). Counts 1 through 3 were found to have been committed for the benefit of or in association with a criminal street gang. (§ 186.22, subd. (b)(1).)

Defendant was sentenced to a total unstayed prison term of life in prison with the possibility of parole after seven years for the premeditated attempted murder, plus 25 years to life for the firearm enhancement. At the time of sentencing, the trial court lacked discretion to strike that enhancement. (§ 12022.53, former subd. (h).)

THE FIRST APPEAL AND HEARING UPON REMAND

In our original opinion, we rejected defendant's claims of prejudicial prosecutorial misconduct, trial court bias, and erroneous admission of defendant's statements to police. Accordingly, we affirmed. We subsequently granted rehearing to determine whether the amendment to section 12022.53, enacted by Senate Bill No. 620 (Reg. Sess. 2017-2018) (Stats. 2017, ch. 682, § 2) (Senate Bill No. 620) and effective January 1, 2018, applied to defendant. The Attorney General conceded it did, but disputed the propriety of a remand. Because defendant was not the actual shooter and the victim was not killed, we were unable to conclude it would be an abuse of discretion to strike the firearm enhancement, and we could not say, from the court's comments at sentencing, that it necessarily would have imposed the enhancement if it could have exercised its discretion not to do so. Accordingly, we remanded the matter for further proceedings.

At the outset of the hearing upon remand, the trial court stated it had read notes relative to the actual trial, the appellate opinion, the prosecution's sentencing statement on remittitur, and the two-part probation report.[3] The court stated its recollection was refreshed concerning the case. The court also confirmed, as something it felt it should consider for purposes of exercising its discretion in defendant's case, that Burch was never prosecuted. The prosecutor explained that defendant's testimony as a witness against Burch would be essential and, given defendant's statements to detectives and his testimony in court, "that became essentially a very unlikely proposition as far as the prosecution against" Burch.

With respect to the potential resentencing, defense counsel argued defendant was not the actual shooter and was very cooperative with investigators, even identifying the shooter for them. Counsel asserted that a sentence of seven years to life was sufficient

---

3 The court noted the first part was a report dated November 17, 2014, which was prepared following a negotiated disposition that ultimately fell through. The second part was dated June 2, 2015, following defendant's convictions at trial.

punishment for being a driver in a shooting where the victim was fully recovered, and where defendant's participation was minimal and the result of peer pressure and defendant "didn't really do anything to harm anybody in this case."

The prosecutor responded that defendant, in his statements to detectives and his trial testimony, gave numerous variations of what took place. The prosecutor asserted the case involved an Eastside Crip member who agreed to go to a rival gang's territory for the sole purpose of targeting an African-American who fit the Country Boy Crip profile and was at a Country Boy Crip hangout. The prosecutor argued defendant had a choice, and his participation was not minimal when the shooting would not have occurred had he not agreed to take Burch to commit the shooting. The prosecutor concluded: "We have a situation where we have an obviously gang-related drive-by shooting in which the driver was well aware of the purpose of this mission of going to Country Boy Crip territory. He was well aware of what was going to happen. He slowed down and made sure that B[u]rch had a good shot at [the victim], multiple shots were fired. [The victim] takes a bullet to the chest and happily does not die. But the reason for [section] 12022.53's increased punishments for firearms related felonies, and particularly in this case gang-related firearms related felonies are so in line with what the facts of this case are that if that increased liability doesn't apply here, it is hard to imagine where it would properly apply. So certainly there may be situations where the Court would exercise its discretion in some scenarios to reduce the punishment by striking that enhancement, but I cannot see how it would be appropriate in this case."

Defense counsel argued this was the type of case for which the statutory amendment was meant, as defendant was not the shooter, never had the firearm, and never planned or intended the shooting but rather was influenced by a friend. Counsel asserted Burch would have committed the shooting even if defendant refused to drive him around. Counsel stated defendant was "paying the price for being really stupid . . . ." He disputed that defendant slowed down so Burch could shoot, stating instead that there

was a traffic light, and Burch saw someone crossing the street and shot him. Counsel reiterated that there was no plan to shoot someone, and seven years to life was adequate punishment.

The court stated that exercising its discretion whether to dismiss the firearm enhancement in the interest of justice meant it had to decide "whether this is a just sentence for this particular crime such that the sentence previously imposed should stand or not." It found the fact defendant was not the actual shooter something that arguably could be considered in defendant's favor. It acknowledged the victim did not die, although it did not give that fact much weight in mitigation, because at issue was the act of attempting to kill someone. In addition, the act in this case was found to have been committed with premeditation and deliberation, which, the court concluded, was supported by the evidence, particularly defendant's statement to detectives that he knew what he and Burch were going to do and he involved himself in the situation. Thus, the court found, there was some planning and preparation. The court did not recall there being a stop sign or stop light that defendant obeyed and that was when the shooting occurred; rather, the car drove by once before the shooting. With respect to defendant, the court found he had a minimal record at the time of the offense, with a juvenile offense for misdemeanor second degree burglary, then a felony drug conviction in 2008 for what now would be a misdemeanor. The court also observed defendant was 26 years old and a high school graduate. The court found those facts to be favorable to defendant.

The court then stated:

> "I guess what I'm struggling with the most . . . is whether or not actually [defendant] played a lesser or minor role in this particular incident. And I'm struggling with that idea in this particular case because ultimately this was going to be a drive-by shooting.
>
> "Two people got together and this was what the plan was to go out and just shoot somebody for . . . apparently no other reason than a gang-related reason, . . . someone not belonging to the same gang. So drive-by shootings are . . . just horrible in the sense that people get killed. And a lot

of times innocent people get killed that weren't even the intended amongst the target pool . . . of other gang members or whatever people that are just there get shot and get killed because of the nature of what a drive-by shooting is, which is essentially drive up on suspected people and start shooting, see who you could kill or hit somebody. So they are horrific crimes that have horrible, horrible results and that people get killed. I think most of the time . . . there is no reason for them whatsoever than some sort of gang-related reason, which is certainly not anything that would be mitigating . . . . But I do understand what takes place, and I think that was the motive here was the gang activity between the two gangs — the Eastside Crips and the . . . Country Boy Crips.

"So you can't have a drive-by shooting without a driver; a lot of times it is the same person. But when it is not the same person, essentially they're acting as one for purposes of committing the crime, and essentially that is what happened here. He's driving the car. He's driving it for the sole purpose of allowing somebody else to shoot willy nilly out at people and with obviously a likelihood somebody would get hit and somebody got killed, which is certainly what happened in this place; somebody was struck, and he didn't die. But it is a horrific, horrific crime which can only be accomplished . . . with a gun. The enhancement is designed to punish the crimes that are committed with firearms or [*sic*] severely then [*sic*] the crime itself. And in this case, based on the totality of the circumstances of the offense, [defendant's] participation, which obviously was necessary to accomplish the crime and knowledge of what was going to take place, I simply don't find that this would be a case where it would be appropriate for me to exercise my discretion and strike the enhancement.

"Consequently, in exercising my discretion, I'm deciding not to strike or dismiss the enhancement. The sentence previously imposed as to all the counts will stand. There will be no resentencing as a result of this Court's decision at this time."

DISCUSSION

Defendant contends the trial court's decision constituted an abuse of discretion. He says the court failed adequately to consider the offense, the offender, and the public interest. We disagree.

Section 12022.53, subdivision (h) provides, in pertinent part: "The court may, in the interest of justice pursuant to Section 1385 . . . , strike or dismiss an enhancement otherwise required to be imposed by this section." "When determining whether a

dismissal will further the interests of justice, the court must consider both the constitutional rights of the defendant and the interests of society, as represented by the prosecution. [Citation.]" (*People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1088; accord, *People v. Williams* (1998) 17 Cal.4th 148, 159; *People v. Orin* (1975) 13 Cal.3d 937, 945.) Furthermore, a trial court's sentencing discretion "must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

With respect to the offense, defendant argues the trial court failed to consider that there is a difference between the actual killer and one who aids and abets an attempted killing. He complains that the court imposed the same sentence via the firearm enhancement — 25 years to life — as should have been imposed on the actual shooter, who was never prosecuted. With respect to the offender, defendant says the court gave no consideration to the fact defendant voluntarily acknowledged wrongdoing at an early stage of the proceedings. Last, defendant says the trial court failed to consider the public interest, in that the court did not consider Senate Bill No. 620's primary purpose of protecting taxpayers from paying for lengthy incarcerations that have little deterrent value.

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " '

[Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377; see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant has failed to demonstrate the trial court's decision was arbitrary or irrational. Defendant's selective quotations notwithstanding, the record clearly shows the trial court was aware defendant's conviction was for attempted murder, not murder; defendant was an aider and abettor; and defendant acknowledged wrongdoing to detectives and also entered into a negotiated disposition early in the proceedings. The court was not required expressly to address each point. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046; see also *People v. Johnson* (1988) 205 Cal.App.3d 755, 758; *People v. White* (1981) 117 Cal.App.3d 270, 280, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16; Cal. Rules of Court, rule 4.409.)

As for the trial court's alleged failure to consider Senate Bill No. 620's purpose, that legislation does not exist in a vacuum such that the purpose of section 12022.53 is irrelevant. The California Supreme Court has stated: "The legislative intent behind section 12022.53 is clear: 'The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.' [Citation.] With respect to aiders and abettors, . . . section 12022.53, subdivision (e)(1), 'is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang.' [Citation.] This subdivision provides a 'clear expression of legislative intent' [citation] to 'severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms.' [Citation.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.)

In enacting Senate Bill No. 620, the Legislature did not repeal section 12022.53 or render it completely inapplicable to aiders and abettors. Rather, the Legislature merely gave trial courts the discretion to strike the firearm enhancement in appropriate cases where doing so will further the interests of justice. We will not presume, simply because the trial court did not mention the legislative purposes of Senate Bill No. 620, that the court was unaware of or failed to consider them. To the contrary, "[o]n appeal, we presume that a judgment or order of the trial court is correct, ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Moreover, " ' "a trial court is presumed to have been aware of and followed the applicable law. [Citations.]" ' [Citation.]" (*In re Julian R.* (2009) 47 Cal.4th 487, 499.)

Defendant fails to persuade us that the trial court did not consider all relevant factors in reaching its decision. Rather, he simply presents information and argument from which a different conclusion reasonably could be drawn. That reasonable people might disagree or reach a conclusion contrary to that of the lower court does not mean that court abused its discretion. Because that court's ruling is neither arbitrary nor unreasonable, defendant is not entitled to a reversal.

DISPOSITION

The order is affirmed.